

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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CHARLES KELLY CHAVEZ,

Petitioner,

v.

ISIDRO BACA, et al.,

Respondents.

Case No. 3:13-cv-00059-MMD-VPC

ORDER

This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, by a Nevada state prisoner.

The petition in the instant action challenges petitioner's state conviction in case number 97C146562. Petitioner previously challenged this same conviction in this Court, filed under case number 2:03-cv-00173-KJD-LRL. The petition in case number 2:03-cv-00173-KJD-LRL was reviewed on the merits and denied by order filed May 15, 2008. (Dkt. no. 32.) Judgment was entered on May 16, 2008. (Dkt. no. 33.) Petitioner appealed. (Dkt. no. 34.) By order filed June 21, 2010, the United States Court of Appeals for the Ninth Circuit affirmed the denial of the habeas petition. (Dkt. no. 42.)

"Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(3)(A). The instant petition is a successive petition, which requires petitioner to seek and obtain

1 leave of the Ninth Circuit Court of Appeal to pursue. See 28 U.S.C. § 2244(b)(3) *et seq.*
2 In the prior habeas case in which petitioner challenged his conviction (case number
3 2:03-cv-00173-KJD-LRL), the Court reviewed the merits of the petition and denied the
4 petition by order filed May 15, 2008. (Dkt. no. 32.) Because the prior habeas corpus
5 petition was decided on the merits, the instant habeas petition is a successive petition.
6 *McNabb v. Yates*, 576 F.3d 1028, 1029 (9th Cir. 2009). Although petitioner in the instant
7 case has attached to his petition an application for leave to file a second or successive
8 petition (dkt. no. 1-3), he has not presented this Court with proof that he has actually
9 obtained leave to file a successive petition from the Ninth Circuit Court of Appeals.
10 Therefore, the instant petition will be dismissed as successive.

11 In order to proceed with any appeal, petitioner must receive a certificate of
12 appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v.*
13 *Ornoski*, 435 F.3d 946, 950-951 (9th Cir. 2006); see also *United States v. Mikels*, 236
14 F.3d 550, 551-52 (9th Cir. 2001). Generally, a petitioner must make “a substantial
15 showing of the denial of a constitutional right” to warrant a certificate of appealability.
16 *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). “The
17 petitioner must demonstrate that reasonable jurists would find the district court’s
18 assessment of the constitutional claims debatable or wrong.” *Id.* (quoting *Slack*, 529
19 U.S. at 484). In order to meet this threshold inquiry, the petitioner has the burden of
20 demonstrating that the issues are debatable among jurists of reason; that a court could
21 resolve the issues differently; or that the questions are adequate to deserve
22 encouragement to proceed further. *Id.*

23 Pursuant to the December 1, 2009, amendment to Rule 11 of the Rules
24 Governing Section 2254 and 2255 Cases, district courts are required to rule on the
25 certificate of appealability in the order disposing of a proceeding adversely to the
26 petitioner or movant, rather than waiting for a notice of appeal and request for certificate
27 of appealability to be filed. Rule 11(a). This Court has considered the issues raised by
28 petitioner, with respect to whether they satisfy the standard for issuance of a certificate


1 of appealability, and determines that none meet that standard. The Court will therefore
2 deny petitioner a certificate of appealability.

3 IT IS THEREFORE ORDERED that this action is DISMISSED as a successive
4 petition.

5 IT IS FURTHER ORDERED that petitioner is DENIED a Certificate of
6 Appealability.

7 IT IS FURTHER ORDERED that the Clerk shall enter judgment accordingly.

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9 DATED THIS 8th day of February 2013.

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13 MIRANDA M. DU
14 UNITED STATES DISTRICT JUDGE
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